SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 336

WANDA MERCER,

Petitioner,

versus

PARIS THERIOT,

Respondent.

PETITION FOR REHEARING

STANLEY E. LOEB
318 Richards Bldg.
New Orleans, Louisiana,
Attorney for
Defendant-Respondent,
Paris Theriot

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PETITION FOR REHEARING

Your respondent, Paris Theriot, prays that this Court grant rehearing as to the judgment rendered herein on May 4, 1964, that said judgment be recalled and set aside and that the judgment of the Fifth Circuit Court of Appeals en banc, rendered on March 14, 1963 and that of the District Court rendered on January 20, 1961 denying plaintiff's motion for new trial, be reinstated and affirmed.

REASONS FOR REHEARING

The basis upon which petitioner seeks rehearing herein is:

1. Due to the unusual posture in which this case reached this Honorable Court, after a second application for writs of certiorari, this Court, through inadvertence, has disposed of important issues never yet decided by the Fifth Circuit Court of Appeals;

2. In so doing, this Honorable Court, has resolved crucial issues not briefed before it, thus sanctioning a wholly novel and highly inequitable procedure whereby petitioner has been deprived of an orderly disposition of all crucial issues;

3. Conceding, arguendo, that the majority herein was correct in holding that there was a sufficiency of evidence to require submission of the case to a jury, the only proper judgment to be rendered herein would be a reversal and a remand, not the revival of the original District Court judgment. The original District Court judgment had been "legally dead" for years and this Court had assisted in its interment by performing the last rites via denial of the first application for certiorari.

BY-PASSING THE FIFTH CIRCUIT

The unusual effect of the majority decision herein cannot precisely be described in conventional legal terms. The net result, as we will show below, has been to reverse two decisions of the Fifth Circuit of Appeals on the sole issue which was the basis of both decisions and to dispose of other crucial issues noted, en passant, but never made the basis of decision by the Fifth Circuit in either instance.

Our position here is not so much a challenge to the bare legal right of this Court to reach such a result, but rather we question the propriety and justice of this unique procedure.

To recapitulate briefly, this case arose in Grand Isle, La. as a result of a supposed "hit and run" accident to which there were no witnesses. *We shall not attempt to reopen, in this application for rehearing, the issue as to whether or*

not the circumstantial evidence was sufficient to require giving the case to the jury. For the sake of argument, we will assume, for the purpose of this petition, that there was sufficient evidence because a majority of this Court has so decided.

The jury awarded plaintiff $25,000.00. On appeal to the Fifth Circuit Court of Appeals, appellant, Paris Theriot, presented three principal specifications of error, appearing on Pages 8 and 9 of the original brief on behalf of appellant, reading as follows:

> "Specification of Errors to be Relied on
>
> "1. The Trial Court erred in denying defendant's motion for directed verdict made at close of plaintiff's case.
>
> "2. The Trial Court erred in denying defendant's motion for directed verdict made at close of defendant's case.
>
> "3. The Trial Court erred in denying defendant's motion to set aside the verdict and judgment and enter judgment for defendant."

Alternatively, the appellant complained of alleged errors in the instructions and denial of others, plus the fact that the verdict was excessive. The challenge to the sufficiency of the evidence brought into focus, not only the weak circumstantial nature of such evidence, but also called sharp attention to the fact that much of such circumstantial evidence was of the rankest hearsay type. Moreover, in reviewing the rather bizarre trial, the Court noted other prejudicial aspects, such as the inflammatory remarks of plain-

tiff's counsel. After a detailed review of the evidence, and the prejudicial aspects of certain incidents in the trial, the Fiftn Circuit declared, through Chief Judge Hutcheson,

> "In the light of the errors above referred to, if the evidence in the case had been ample to support the verdict and the verdict and judgment, but for the manner and way in which the case was tried, could stand, the judgment would have to be reversed for the errors which, dominating the trial, deprived the defendant of his day in court and caused his conviction, on rumor and hearsay, not of negligent fault but of bribery and corruption." (262 F. 2d 75A)

Restated in simpler language, we submit that the foregoing paragraph means simply this: Even if the evidence in the case had been sufficient to support the verdict, the judgment would have to be reversed because of prejudicial errors quo ad admission of hearsay evidence as to bribery, corruption, etc. After the quoted paragraph above, the Fifth Circuit immediately continues:

> "There remains only the determination whether, with the record stripped of all its erroneous and prejudicial occurrences, the admissible and relevant evidence in the case was sufficient to support a verdict and whether, if not, the case should nevertheless be remanded for a new trial in accordance with law." (262 F. 2d 259)

After discussing further the insufficiency of the evidence the court concluded:

> "Because, however, evidence, as distinguished from rumor and speculation, as to the why and how of the death of plaintiff's decedent and as to the responsibility of defendant for it, may have been or may be discovered, we order the judgment reversed and the cause remanded with directions to enter a judgment for the defendant unless plaintiff, within a time and under conditions to be fixed by the district judge, makes a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury will be offered, in which event the judgment shall be for a new trial." (262 F. 2d 760)

The plaintiff thereupon sought relief from this judgment by applying to this Court for a writ of certiorari, which was denied. 359 U.S. 983, 79 S. Ct. 941; rehearing denied, 360 U.S. 914.

Thereupon, in response to the mandate of the Court of Appeals, the District Court reexamined the sole matter he was directed to consider, namely, whether on a new trial "evidence of sufficient probative force to justify submission of the cause to the jury" might be shown. (262 F. 2d 761)

After full hearing on this issue, the District Court concluded:

> "This court has carefully studied the additional evidence submitted in support of the motion for new trial. This evidence, while persuasive, would be inadmissible in a new trial under the hearsay rule." (R. 30; fol. 352)

The motion for a new trial was therefore denied and, after due argument, an application for a re-hearing of this motion was denied January 20, 1961. (R. 233; fol. 356)

It was from this order alone (described as a "final judgment" by plaintiff) that an appeal was taken. (R. 234; fol. 359). On appeal, the question was raised as to whether or not the denial of a new trial, under the circumstances, was even appealable. In holding that, under the peculiar circumstances, the order was a "final decision" and therefore appealable, the Fifth Circuit declared:

> "Here, however, the plaintiff's motion served a different function. It was filed in direct response to the invitation in this Court's mandate that the plaintiff present new evidence. If the plaintiff had made 'a satisfactory showing that on another trial evidence of sufficient probative force to justify submission of the cause to the jury [would] be offered,' the plaintiff would have been entitled to a 'judgment for a new trial.' Denial of the motion was a final decision by the district court that the plaintiff had failed to meet the terms of the mandate. The Court therefore holds that in the circumstances of this case the denial of the motion was an appealable order." (316 F. 2d 638)

Moreover, on this second appeal, the Fifth Circuit, en banc, declared:

> "The second appeal does not require a reconsideration of the merits. The narrow questions before the Court en banc are whether the district court properly construed the mandate and whether the district court abused its discretion in holding

that the plaintiff failed to meet the terms of the mandate, that is, failed to make a satisfactory showing that the *additional* evidence would justify submission of the case to the jury. (316 F. 2d 638)

BASIS FOR APPLICATION FOR CERTIORARI WAS LIMITED TO COURT'S ACTION QUO AD SUFFICIENCY OF EVIDENCE

Plaintiff herself, in applying for certiorari, stated to this Court, as a basis for such review, the following "REASONS FOR GRANTING THE WRIT", and no others:

> "I. IN REEXAMINING FACTS PREVIOUSLY FOUND BY THE JURY, THE COURT OF APPEALS FOR THE FIFTH CIRCUIT VIOLATED THE MANDATE OF THE SEVENTH AMENDMENT AS WELL AS THE SETTLED JURISPRUDENCE OF THIS COURT." (Petition for certiorari, page 8, 9)
>
> "II. THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FINDING PETITIONER'S EVIDENCE WAS INSUFFICIENT TO JUSTIFY SUBMISSION OF THE CASE TO THE JURY" (Petition for certiorari, page 14)

DISPOSITION OF OTHER ISSUES, BOTH SURPRISING AND PREJUDICIAL

With the case in the above posture, defendant-respondent stated in his original brief to this Court:

> "Petitioner has not discussed in her brief the holding of the Court of Appeals in the first appeal

> that there was reversible error committed at the trial without reference to the absence of evidence sufficient to take the case to the jury. Respondent assumes that petitioner concedes that there was reversible error committed on the trial and, since the issue has not been raised by petitioner, respondent does not feel constrained to discuss it here." (Respondent's brief, page 14)

As noted above, the sole actual basis of the Fifth Circuit's original decision was the lack of sufficient evidence. The other prejudicial matters noted in the opinion were certainly not the basis of decision and the clear import of the opinion was that there were numerous other prejudicial matters, including hearsay, errors in instructions, and inflammatory remarks, *which might have been made the basis of decision*. It is clear that the whole focus of the Court's attention below was upon the issue as to sufficiency of evidence and the Fifth Circuit never spelled out its disposition of the other errors noted. However, in an utterly surprising development, this Court, after stating its right to "consider all of the substantial federal questions determined in the earlier stages of litigation" as well as "those that were before the Court of Appeals upon the second appeal", (Opinion, Page 2) then proceeded to declare:

> "We consider first the alleged errors in the conduct of the trial." (Opinion, Page 2)

Your Honors then proceed to analyze "alleged errors in the conduct of the trial", none of which were noted by formal specification of error and none of which, per se, formed the basis of decision. Your Honors then proceed to dispose of these supposed "alleged errors", which cover A.

Erroneous Instructions; B. One instance of hearsay evidence; and C. Prejudicial and inflammatory remarks of counsel.

After disposing of these three points, the majority opinion then declares:

> "Our examination of the trial record reveals not only that there were no errors affecting substantial justice, but also that the trial judge conducted the trial with scrupulous regard for the litigants' rights." (Opinion, Page 3)

The Court then goes on to consider "the sufficiency of the evidence adduced at trial".

We submit that at the time this case was presented for argument to Your Honors, there was not the slightest indication that this Court, even if it reversed the Fifth Circuit, would go as far as it did. From respondent's standpoint, the worst that could reasonably be expected would be a reversal of the Fifth Circuit's decision and the ordering of a new trial. Irrespective of the power or bare legal right of this Court to do what it did, there was certainly no reason to suspect that issues would be decided which had never been disposed of formally below and which could easily have been dispositive of the case, regardless of this Court's determination of the issue as to sufficiency of the evidence. Thus, although the Fifth Circuit noted that there were many prejudicial matters in the trial, it neither made them the basis of the decision, nor did it indicate that there may not well have been *other grievously prejudicial errors not disclosed.*

THUS, IN ONE SHORT, ALL-ENCOMPASSING PARAGRAPH, THE COURT HAS UNDERTAKEN TO DECLARE THE ENTIRE RECORD FREE OF PREJUDICIAL ERROR. This was done without benefit of briefing on the other issues, noted but not passed upon. The remainder of the record, we submit, was "terra incognita" when proceeding without adequate aids to legal navigation. The risk of error was equivalent to that of Christopher Columbus when essaying to cross an uncharted sea by "dead reckoning" and without the aid of celestial navigation. Proceeding in this manner, we submit that this Honorable Court has obviously gone far off course, as indicated by the following:

ERRORS NOTED BELOW BUT NEVER YET DISPOSED OF HERE OR BY THE FIFTH CIRCUIT

The record discloses that, in addition to the error of the Trial Court as to one aspect of the general charge to the jury, there were at least two other errors complained of, namely, failure to give special requests of the defendant *No. Three and No. Six* (R. 187) Failure to give these special charges was specifically objected to. (R. 191)

This Court, while holding that there was no prejudicial error committed by the Trial Court quo ad that portion of the charge which was later corrected, is completely silent as to possible error in regards to special requests of defendant No. Three and No. Six, supra. *The text of these special charges do not appear in the record for the simple reason that no one was concerned with them below.* They were not listed in the designation of the record in either appeal and if by chance a copy of these instructions should physically be found among the original exhibits

sent up to this Court, there is no valid basis for their being there, since such requests are neither "pleadings" nor "exhibits" within the purview of the designation of the record or accepted legal parlance. (R. 200, 205, 235)

We respectfully submit, therefore, that it is obvious that this Court could not have weighed the possible error on the refusal of these special requests as to instructions *because the Court simply does not know what these requests covered.*

The foregoing is merely the most glaring example of the dangers involved in the procedure sanctioned here. Even as to the error below concerning the admission of highly prejudicial testimony as to the alleged "payoff", the Court's abrupt dismissal of this matter is focused on the narrow point that no objection was made and that counsel for defendant virtually waived the error by pursuing the point of further examination of the witness. This conclusion overlooks entirely the realities of life during heat of trial. THE HIGHLY PREJUDICIAL TESTIMONY AS TO THE ALLEGED "PAY-OFF" CAME SUDDENLY AND WITHOUT WARNING. IT CAME IN ONE SWIFT THRUST, WITHOUT TIME FOR OBJECTION. The highly damaging question was posed, without warning and completely out of context with the trend of the questions being asked. We quote the following examination of the witness who was the original source of the highly prejudicial hearsay testimony as to bribery:

"Q. And you did not see the towel or the clothes?
A. I saw no clothing. The only thing that I saw were the two blankets at the scene of the accident which I assume was used to keep him covered, but other than that, I haven't seen

a bit of clothing that was worn by the victim or clothing or any part of his clothes that were taken from Mr. Theriot's car or any other place.

Q. OFFICER FOLSE, DID YOU LEARN THAT THERE HAD BEEN A PAYOFF IN THIS CASE?

A. I WAS TOLD, HEARSAY.

Q. You was told there was?

A. I was told that there was a pay-off.

MR. BRUMFIELD:
That is all." (R. 149, 150)

The foregoing highly damaging testimony came quickly in response *to a question which was deliberately leading.* There was no time for objection and the highly inflammatory matter was tossed directly into the lap of the jury. The damage was done and no amount of instruction by the Court thereafter could erase from the jury's mind the prejudicial impact of this rank hearsay. Thereafter, counsel did the only thing he could do which would have any practical effect to reduce the damage. He sought to nail down the fact that the reference to the "pay-off" or bribery was based on the wildest rumor. Thus, counsel for defendant asked:

"Q. Mr. Folse, who told you there had been a pay-off in this case?

A. Trooper Milliet.

Q. And that is all you know about it? Just that Milliet told you there had been a pay-off?

A. That is the only one. We had a conversation one night while I was on duty and happened to stop by, and I happened to mention this

> case. He said, I asked him, "Did you find out what happened to the evidence?" "Oh", he said, "Prudhomme was paid off."
>
> Q. He said that Prudhomme was paid off?
>
> A. He said that Prudhomme was losing weight over it, or something like that, you know, in a regular conversation that goes on.
>
> Mr. Hughes: That is all. Thank you." (R. 152)

Thus, there was a great deal more to be weighed in considering the prejudicial effect of this error over and above the mere technical conclusion that the defendant voluntarily went into the matter. Nor is there necessarily any question involved here as to whether or not the injection of this prejudicial and inflammatory matter was due to the fault of counsel for either side or the Trial Court itself. This may well have been one of those unforeseen and unfortunate developments which occasionally occur without anyone's fault but nevertheless destroy absolutely the possibility of a fair trial.

Thus, in its summary disposal of this issue, without benefit of briefing, we submit this Court has erred seriously. *There are other instances where prejudicial error may have* been committed, errors which have not been discussed at *all in the majority opinion herein*. These relate to such matters as the unnecessary admission of portions of a hearsay statement by the device of allowing a written statement by the officer allegedly bribed to get before the jury. (R. 70) Overlooked entirely also is *the complete mystery as to the discrepancy shown in the record as to the date of death*. This issue was specifically raised by counsel for defendant in the Trial Court and the mystery as to this confusing point has never yet been solved. (R. 174)

In conclusion, we submit that there are other instances of possible prejudicial error as to which this Court has never been briefed and which have never been mentioned in the majority opinion. We respectfully suggest therefore that respondent-defendant is entitled to a rehearing in this case in order that crucial issues, never yet considered by this Court, may be disposed of by orderly and normal procedures.

For the foregoing reasons respondent-defendant respectfully prays that a rehearing be granted herein.

Respectfully submitted,

STANLEY E. LOEB
318 Richards Building
New Orleans, Louisiana 70112
Attorney for
Respondent-Defendant

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is filed in good faith and not for the purpose of delay,

STANLEY E. LOEB
Attorney for
Respondent-Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing petition for rehearing and brief in support on behalf of respondent-defendant has this day been served upon counsel for petitioner by placing same in the United States mail this day of , 1964, addressed as follows: H. Alva Brumfield, Esquire, 205 American Bank Building, Baton Rouge, Louisiana.

STANLEY E. LOEB